

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

KEVIN BROOKS,

Petitioner,

v.

WARDEN NEVINS, et al.,

Respondents.

Case No. 3:14-cv-00223-MMD-VPC

ORDER

This habeas matter comes before the Court on petitioner's application to proceed *in forma pauperis* (dkt. no. 1) and for initial review under Rule 4 of the Rules Governing Section 2254 Cases. The pauper application will be granted on the showing made.

Turning to initial review, the petition clearly is successive on its face, following the filing of numerous prior successive petitions by petitioner.

Kevin Brooks seeks to challenge his October 5, 1990, Nevada state court conviction, pursuant to a jury verdict, of two counts of burglary, and his adjudication as a habitual criminal, in Case No. C093713 in the Eighth Judicial District Court for the State of Nevada.

By an order and judgment entered on August 6, 1998, this Court denied Brooks' prior federal petition in Case No. 3:97-cv-00457-ECR-PHA on the ground that petitioner's claims were procedurally defaulted. The Court of Appeals denied a certificate of appealability.¹

¹A copy of the docket sheet in the 1997 action is available on the Court's electronic docketing system. The Court's statement of the basis for the August 6, 1998, dismissal is quoted in an April 20, 2011, denial of petitioner's Rule 60(b) motion in Case No. 3:01-cv-00236-ECR-VPC.

1 Thereafter, petitioner has filed a number of habeas petitions in this Court
2 challenging the same judgment of conviction that have been denied on, *inter alia*, the
3 ground that the petitions were successive. See Case No. 3:01-cv-00236-ECR-VPC;
4 Case No. 3:05-cv-00054-ECR-RAM; Case No. 3:06-cv-00458-JCM-RAM; Case No.
5 3:07-cv-00394-ECR-VPC; and Case No. 3:12-cv-00497-RCJ-WGC.²

6 It further appears that the Court of Appeals has denied numerous applications by
7 petitioner to that court seeking permission to pursue a second or successive petition.
8 See Ninth Circuit Nos. 01-71340, 04-76420, 06-74643 and 10-73166.

9 The online record of the Court of Appeals does not reflect a grant of permission
10 to pursue a second or successive petition prior to the filing of the present petition.

11 The Court further takes judicial notice of the content of the online docket record
12 of the state district court, which reflects that no intervening amended or corrected
13 judgment of conviction has been filed in C093713 in that court.³

14 Under 28 U.S.C. § 2244(b)(3), before a second or successive petition is filed in
15 the federal district court, the petitioner must move in the court of appeals for an order
16 authorizing the district court to consider the petition. A federal district court does not
17 have jurisdiction to entertain a successive petition absent such permission. In the
18 present petition, petitioner seeks to challenge the same judgment of conviction that he
19 previously challenged in this Court in Case No. 3:97-cv-00457. That petition was
20 dismissed on the basis of procedural default. A petition filed after a prior petition was
21 dismissed on the basis of procedural default constitutes a successive petition. *E.g.*,
22 *Henderson v. Lampert*, 396 F.3d 1049, 1052-53 (9th Cir. 2005). The present petition

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24 ²Case No. 3:04-cv-00171-HDM-VPC was dismissed for lack of jurisdiction over
the subject matter. The Court noted in the dismissal order the dispositions of the prior
25 federal petitions.

26 ³See, e.g., *Harris v. County of Orange*, 682 F.3d 1126, 1132-32 (9th Cir. 2012)(a
federal court may take judicial notice of matters of public record, including documents
on file in federal or state courts).

27 The Court notes in passing that the February 12, 2014, order of the Supreme
28 Court of Nevada in No. 63879 in that court reflects that Brooks has filed five successive
petitions in the state courts.

1 thus constitutes a second or successive petition. Petitioner thus may pursue a petition
2 only with permission from the Court of Appeals, which he has not obtained.

3 The present petition therefore will be dismissed without prejudice as a
4 successive petition. Further proceedings herein in advance of entry of judgment would
5 be both futile and an imprudent application of limited judicial resources. Petitioner
6 simply is frivolously continuing to file clearly successive petitions despite having been
7 repeatedly informed that he first must obtain permission from the Court of Appeals to do
8 so.⁴

9 It is therefore ordered that petitioner's application to proceed *in forma pauperis*
10 (dkt. no. 1) is granted and that petitioner will not be required to pay the filing fee herein.

11 It is further ordered that the Clerk of Court shall file the petition and that the
12 petition is dismissed without prejudice as a successive petition.

13 It is further ordered that the Clerk shall file the motion for appointment of counsel
14 submitted with the petition, that the motion is denied on a finding that the interests of
15 justice do not require the appointment of counsel on the clearly successive petition, and
16 that the Clerk shall reflect the denial of the motion in a manner consistent with the
17 Clerk's current practice for such docket entries.

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21 ⁴The Court's action herein does not reflect that the petition otherwise is free of
22 other deficiencies. Over and above untimeliness and procedural default, petitioner failed
23 to use the Court's required habeas petition form as required by the local rules.
24 Petitioner instead used the required petition form essentially as a cover document for an
25 entirely handwritten petition. A habeas petitioner instead must allege all of his claims
26 within the four corners of the petition form, without incorporation of other documents.

27 The Court further would note that petitioner's procedural and merits arguments
28 all derive from the same flawed premise — that he improperly was denied a right to self-
representation on his direct appeal. The United States Supreme Court instead has held
that a criminal defendant does not have a right to self-representation on direct appeal.
See *Martinez v. Court of Appeal of California*, 528 U.S. 152 (2000).

In all events, however, petitioner first must obtain permission from the Court of
Appeals to pursue a second or successive petition, whether or not based upon
purported structural error, allegedly void judgments, or an alleged lack of jurisdiction in
other courts.

1 It is further ordered that a certificate of appealability is denied. Jurists of reason
2 would not find the district court's dismissal of the successive petition without prejudice to
3 be debatable or wrong, for the reasons discussed herein.

4 The Clerk of Court shall enter final judgment accordingly, dismissing this action
5 without prejudice.

6 DATED THIS 30th day of April 2014.

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9 MIRANDA M. DU
10 UNITED STATES DISTRICT JUDGE
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